VIII

FAMILY LAW

The Expanding Role of the Juvenile Court in Child Custody Disputes

In re B.G.[1] The first juvenile court dependency case reviewed by the California Supreme Court since 1930,[2] *In re B.G.* was highly atypical. Most juvenile court proceedings involve intervention in the parent-child relationship by the state, which alleges that the parent is inadequately caring for his or her child. *B.G.*, on the other hand, involved a contest between a natural parent and foster parents who, by the time of the decision, had had continuing custody of the subject children for almost five years. The court facilitated a proper result—placement with the foster parents—but in so doing it unfortunately and unnecessarily distorted juvenile court law. If *B.G.* is read as precedent for the typical dependency proceeding, its impact on California law will be detrimental.

The court in *B.G.* made three principal rulings. The least controversial was its holding that foster parents who have developed a parent-like relationship with a child have standing to be parties in juvenile court dependency proceedings concerning that child.[3] While recognizing the importance of de facto parent-child relationships in making determinations concerning a child's welfare,[4] this holding reflects an expanded view of the role of the juvenile court, for it approves that court as a forum for settling child custody disputes between private parties as well as between parent and state.

This expanded view of the juvenile court's function is even more evident in the two rulings going to the essence of the state's role as *parens patriae*. First, the court decided that once the state has established jurisdiction over a child, this jurisdiction may continue as long as the juvenile court finds that continued jurisdiction is in the best interests of the child, even when the initial grounds for jurisdiction no longer exist.[5] Second, the court held that section 4600 of the California Civil Code is applicable in juvenile court dependency actions. Therefore, once jurisdiction is established, for whatever reason, a child

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1. 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974) (Tobriner, J.) (5-2 decision).
2. *See In re* Edwards, 208 Cal. 725, 284 P. 916 (1930).
3. 11 Cal. 3d at 692-93, 523 P.2d at 253, 114 Cal. Rptr. at 453.
4. See text accompanying notes 75, 79 *infra*.
5. 11 Cal. 3d at 691-92, 523 P.2d at 252, 114 Cal. Rptr. at 452.

may be removed from the custody of the parent if the court finds both that this removal would be in the best interests of the child and that parental custody would be detrimental to the child.[6]

Both of these rulings, while helping to reach what was probably a correct disposition in this case, violate certain principles underlying the operation of juvenile courts. This Note will attempt to analyze the court's rulings in light of these principles. The analysis will include an exploration of the potential impact of these rulings—both practical and constitutional—on the more usual dependency cases, and a discussion of legal reforms which might better dispose of cases that raise the issues presented in *B.G.*

I. THE FACTS

B.G. and V.G., Czech nationals, were brought to California in 1969 by their father, a political refugee, without consent of their mother, one of the parties in this action. The children lived with their father's parents but, during the days when their father worked, they were cared for by neighbors, the Smiths, who appeared in *B.G.* as amici curiae. The father died shortly after coming to California.[7] After his death, the children began staying with the Smiths, and the Smiths applied for a foster home license. In response, the probation department of San Bernardino County filed a dependency petition in juvenile court. The probation department failed to give notice of the pending proceedings to the mother. At the hearing, jurisdiction was established under section 600 of the Welfare and Institutions Code[8]

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6. *Id.* at 694-99, 523 P.2d at 254-58, 114 Cal. Rptr. at 454-58.

7. The dying father dictated a "will" stating his wish that the children remain in the United States and not be returned to Czechoslovakia. He preferred that his mother or the Smiths take care of them. *Id.* at 684 & n.3, 523 P.2d at 247 & n.3, 114 Cal. Rptr. at 447 & n.3.

8. Section 600 provides:

> Any person under the age of 18 years who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge such person to be a dependent child of the court.
>
> (a) Who is in need of proper and effective parental care or control and has no parent or guardian, *or has no parent or guardian willing to exercise or capable of exercising such care or control, or has no parent or guardian actually exercising such care or control.*
>
> (b) Who is destitute, or who is not provided with the necessities of life, or who is not provided with a home or suitable place of abode.
>
> (c) Who is physically dangerous to the public because of a mental or physical deficiency, disorder or abnormality.
>
> (d) Whose home is an unfit place for him by reason of neglect, cruelty, depravity, or physical abuse of either of his parents, or of his guardian or other person in whose custody or care he is.

CAL. WELF. & INST'NS CODE § 600 (West 1972) (emphasis added). (Except for section 4600 of the Civil Code, all references to California statutory law herein are to provisions of the Welfare and Institutions Code.)

and the children were placed with the Smiths as foster parents. This disposition was renewed at the annual review hearing in 1970.

Not until the 1971 annual review proceeding did the mother, who had thought that the children were still living with the grandparents, actively seek the return of B.G. and V.G. At this hearing, the court continued its jurisdiction over the children but ordered that custody be returned to the mother. The Smiths, however, refused to give up the children, and after filing a writ of prohibition, succeeded in reopening the dispositional hearing. This time they argued that the court lacked jurisdiction in the matter because of its failure to give notice to the mother in the 1969 jurisdictional hearing. The mother, in order to overcome this objection, stipulated to the court's jurisdiction in the original action. The juvenile court then reversed its previous order and, in light of what it perceived as the childrens' best interests, returned custody of them to the Smiths.[9]

On appeal to the California Supreme Court, the mother challenged both the continuing jurisdiction of the juvenile court and its last dispositional order. She argued that the juvenile court had no jurisdiction, both because of its failure to notify her of the proceedings and because the original basis for jurisdiction, the absence of a parent willing and able to exercise parental control, had ceased to exist.[10] The supreme court held that, while failure to notify a parent is a serious jurisdictional defect, it had been cured by the mother's waiver.[11] It held further that, under section 729 of the Welfare and Institutions Code,[12] once jurisdiction under section 600 had been established, it

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The trial court found that "(1) the father had died in California; (2) the 'mother's exact whereabouts is unknown; she is presumed living in Czechoslovakia;' and (3) the children are Czechoslovakian nationals." 11 Cal. 3d at 684, 523 P.2d at 247, 114 Cal. Rptr. at 447.

9. 11 Cal. 3d at 683-87, 523 P.2d at 246-49, 114 Cal. Rptr. at 446-49.

10. Brief for Appellant at 15-18.

11. 11 Cal. 3d at 688-89, 523 P.2d at 250-51, 114 Cal. Rptr. at 450-51.

12. Section 729 provides:

> Every hearing in which an order is made adjudging a minor a dependent child of the juvenile court pursuant to Section 600 and every subsequent hearing in which such an order is made, except a hearing at which the court orders the termination of its jurisdiction over such minor, shall be continued to a specific future date not more than one year after the date of such order. The continued hearing shall be placed on the appearance calendar and the probation officer shall make an investigation, file a supplemental report and make his recommendation for disposition. The court shall advise all persons present of the date of the future hearing and of their right to be present, to be represented by counsel and to show cause, if they have cause, why the jurisdiction of the court over the minor should be terminated. Notice of hearing shall be mailed by the probation officer to the same persons as in an original proceeding and to counsel of record by certified mail addressed to the last known address of the person to be notified, or shall be personally served on such persons, not earlier than 30 days preceding the date to which the hearing was continued.

CAL. WELF. & INST'NS CODE § 729 (West 1972).

could be continued so long as it was in the best interests of the child.[13]

The mother's challenge to the dispositional order was that she could not, as a matter of law, be deprived of custody of her children unless she was found to be unfit, a finding the trial court had explicitly rejected.[14] The supreme court held that although the trial court was wrong in awarding custody on the basis of the best interests test, a finding of parental unfitness was not required in order to award custody to a nonparent. It found that section 4600[15] of the Civil Code stated the law applicable in juvenile court custody disputes and that, by its terms, a trial court could award custody to nonparents if it found that parental custody would be detrimental to the child.[16] On remand, the trial court took no new evidence, made the required finding of detriment, and affirmed its grant of custody to the foster parents.[17]

II. THE JURISDICTIONAL PROBLEM

So long as appropriate steps had not been taken to notify the mother and she received no actual notice of the juvenile court dependency proceedings, the juvenile court lacked proper jurisdiction as a constitutional matter in the original proceeding.[18] If she had re-

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13. 11 Cal. 3d at 691-92, 523 P.2d at 251-52, 114 Cal. Rptr. at 451-52.

14. Brief for Appellant at 17-18.

15. The relevant language provides:

> In any proceeding where there is at issue the custody of a minor child, the court may, during the pendency of the proceeding, or at any time thereafter, make such order for the custody of such child during his minority as may seem necessary or proper. If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to his wishes in making an award of custody or modification thereof. Custody should be awarded in the following order of preference:
>
> (a) To either parent according to the best interests of the child.
>
> (b) To the person or persons in whose home the child has been living in a wholesome and stable environment.
>
> (c) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.
>
> Before the court makes any order awarding custody to a person or persons other than a parent, without the consent of the parents, it must make a finding that an award of custody to a parent would be detrimental to the child, and the award to a nonparent is required to serve the best interests of the child.
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> . . .

CAL. CIV. CODE § 4600 (West Supp. 1974).

16. 11 Cal. 3d at 695-700, 523 P.2d at 255-58, 114 Cal. Rptr. at 455-58.

17. *In re* B.G. Nos. J-49661, J-49662 (San Bernadino County Super. Ct. Sept. 4, 1974). The two dissenting justices, perhaps foreseeing this result, had urged the court itself to enter a formal finding of detriment since "the trial judge, though he did not use the magic word *detrimental*, . . . in effect clearly determined detriment would result should the children be returned to the natural mother." 11 Cal. 3d at 700, 523 P.2d at 259, 114 Cal. Rptr. at 459 (Clark & McComb, JJ., dissenting).

18. 11 Cal. 3d at 688-89, 523 P.2d at 250, 114 Cal. Rptr. at 450, and cases cited therein.

ceived notice of this proceeding and had appeared to take the children, jurisdiction would never have been established because the statutory basis for jurisdiction—that the child "has no parent or guardian . . . actually exercising . . . care or control"[19]—would not have existed. Despite this jurisdictional paradox, the mother's tactical decision to waive jurisdiction enabled the court to treat *B.G.* as if jurisdiction had been properly established in the original action.

The issue then became whether, in order for the juvenile court to *continue* its jurisdiction in the 1971 annual review proceeding and decide the now-contested custody question, there must have existed grounds on which original jurisdiction could be founded at the time of the annual review, or whether jurisdiction could be continued according to some other standard. An earlier court of appeal decision, *In re Neal D.*,[20] had held that jurisdiction could be continued only where the original jurisdictional basis still existed or where new grounds constituting a basis for jurisdiction were alleged and proved. The court in *B.G.* rejected that *Neal D.* holding and found that the juvenile court's jurisdiction, once established, "continues as long as the best interests of the minor so require."[21]

California's juvenile court law has since 1961 utilized a bifurcated procedure, requiring an initial hearing to show the existence of specific facts which allow the juvenile court to assume jurisdiction over a child. Only after the jurisdictional hearing may the juvenile court turn its attention to meeting the child's needs in a dispositional hearing.[22] The purpose of this requirement is to ensure that the state does not interfere in the parent-child relationship absent conditions which the legislature has determined require such intervention.[23] The fact that a juvenile court may believe some course of action best suits a child's interests is not enough to allow the court to impose its judgment unless a jurisdictional basis is first established. The supreme court in

19. 11 Cal. 3d at 688, 523 P.2d at 250, 114 Cal. Rptr. at 450.

20. 23 Cal. App. 3d 1045, 100 Cal. Rptr. 706 (5th Dist. 1972).

21. 11 Cal. 3d at 691-92, 523 P.2d at 252, 114 Cal. Rptr. at 452. This rejection of *In re Neal D.* was based on a curious recitation of language from three sections of the Welfare and Institutions Code: the court cited section 607, which states that dependency jurisdiction by the juvenile court may continue until the child is 21 years of age; section 778, which enables parents to compel termination of the juvenile court's jurisdiction by showing that this termination would be in the best interests of the child; and the portion of section 729 that requires persons present at a review hearing to be informed of their right to show cause why the jurisdiction of the juvenile court should be terminated. None of the language in these sections speaks to the question of what burden a state must meet in order to continue its jurisdiction where a parent shows that the original jurisdictional basis no longer exists.

22. CAL. WELF. & INST'NS CODE §§ 600-02, 701, 702, 725 (West 1972 & West Supp. 1974).

23. *See In re* Gault, 387 U.S. 1, 19-21, 30-34 (1967).

B.G. disregarded this firmly established safeguard of the parent-child relationship by permitting a juvenile court *continued* jurisdiction if the court feels its prolonged presence is best for the child. The *B.G.* decision thus substituted "best interests" as a jurisdictional test in a particular set of cases—where grounds for jurisdiction *at one time* existed—for the usual, more rigorous jurisdictional test meant to prevent state intrusion into parent-child relationships except in highly unusual circumstances.[24]

The best interests test has often been criticized as both a jurisdictional and a dispositional test because of its inherent subjectivity and vagueness.[25] To be used successfully, the standard requires a court to predict future behavior, benefits, and harms—something even trained psychiatrists cannot do reliably.[26] A court's decision may be influenced by its value judgments on how best to raise children, violating the principle, long accorded constitutional protection, that parents have the primary responsibility for raising their children.[27] Moreover, use of a judge's personal values in applying the best interests test may well result in discrimination against low-income families, who are not well represented on the bench and who may share different values about child-rearing.[28]

A portion of the trial court's opinion cited without disapproval by the supreme court in *B.G.* illustrates some of the dangers of the best interests test:

> 'I can't help but conclude from the testimony that [the mother] has not coped well with the problems of marriage and home and motherhood. I don't know whether this is due to her personal personality or psychological problems, or whether it is due to the culture in which she lives. Maybe, to some extent, it is due to the modern liberation of women movement. She apparently does a good job

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24. *In re* Raya, 255 Cal. App. 2d 260, 265, 63 Cal. Rptr. 252, 256 (3d Dist. 1967). *See also In re* Donna G., 6 Cal. App. 3d 890, 86 Cal. Rptr. 421 (2d Dist. 1970). See text accompanying notes 31-33, 46 *infra.*

25. Foster & Freed, *Children and the Law*, 2 FAM. L.Q. 40 (1968); Katz, *Foster Parents Versus Agencies: A Case Study in the Judicial Application of the "Best Interests of the Child" Doctrine*, 65 MICH. L. REV. 145 (1966); Krause, *Child Welfare, Parental Responsibility and the State*, 6 FAM. L.Q. 377 (1972); Sayre, *Awarding Custody of Children*, 9 U. CHI. L. REV. 672 (1942); Comment, *The Custody Question and Child Neglect Rehearings*, 35 U. CHI. L. REV. 478 (1968); Comment, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151 (1963).

26. *See* J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 6, 49-52 (1973).

27. See text accompanying notes 36-38, 46 *infra.*

28. *See* Foster & Freed, *Unequal Protection: Poverty and Family Law*, 42 IND. L.J. 192, 198-99 (1966); Kay & Philips, *Poverty and the Law of Child Custody*, 54 CALIF. L. REV. 717, 733 et seq. (1966); Paulsen, *Juvenile Courts, Family Courts and the Poor Man*, 54 CALIF. L. REV. 694, 699 (1966).

> at her employment, but you can't help but note that both of her marriages were impelled by unwanted pregnancies, that the second child of the first marriage was unwanted.
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> 'I can't help but observe from the testimony, particularly from reading the letters written to her by her first husband, [the father] and saved by her, that there were serious problems between her and [the father] . . . .
>
> 'There has been much talk in the evidence about [the mother's] inability to express her warmth, her love for the children.
>
> ' . . . Apparently that has been a problem from the beginning.
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> 'The little evidence we have of her second marriage seems to indicate bad omens for the future.
>
> 'I find it difficult to conceive how a woman marrying a younger man and requiring him to sleep in the living room, while she sleeps in the bedroom with the child, can expect a long and happy married life.
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> . . . .
>
> 'I have been impressed by all of the evidence that [the mother] . . . . perhaps being a bright woman, being a handsome woman, being a success in her occupation has grown much more accustomed to getting than to giving.'[29]

The trial judge's focus on the mother's marital and professional relations reveals his subjective evaluation that she did not fit his image of healthy motherhood, an evaluation which must have influenced his decision regarding the children's placement and with which many would probably disagree.

The California Juvenile Court Act, through section 600 of the Welfare & Institutions Code,[30] rejects a court's right to make jurisdictional decisions based simply on a best interests standard. This statutory limitation on state intervention in the parent-child relationship reflects legislative recognition that the state does not make a good parent and that it is rarely in a better position than the child's parents to determine that child's best interests.[31] Many appellate decisions have emphasized the legislature's refusal to allow jurisdiction on the basis of the best interests test.[32] As one court explained:

> [B]efore section 600, subdivision (a), authorizes the drastic step of judicial intervention, some threshhold level of deficiency is de-

29. 11 Cal. 3d at 686-87 n.10, 523 P.2d 249 n.10, 114 Cal. Rptr. 449 n.10.

30. See note 8 *supra.*

31. *See* Guardianship of Smith, 42 Cal. 2d 91, 95, 265 P.2d 888, 891 (1954) (Traynor, J., concurring). See also text accompanying notes 36-38 *infra.*

32. *E.g., In re* Neal D., 23 Cal. App. 3d 1045, 100 Cal. Rptr. 706 (5th Dist. 1972); *In re* Donna G., 6 Cal. App. 3d 890, 86 Cal. Rptr. 421 (2d Dist. 1970); *In re* A.J., 274 Cal. App. 2d 199, 78 Cal. Rptr. 880 (1st Dist. 1969); *In re* Raya, 255 Cal. App. 2d 260, 63 Cal. Rptr. 252 (3d Dist. 1967).

> manded. Although a home environment may appear deficient when measured by dominant socioeconomic standards, interposition by the powerful arm of the public authorities may lead to worse alternatives. A juvenile court may possess no magic wand to create a replacement for a home which falls short of ideal.[33]

This "threshold level of deficiency" is as necessary to a juvenile court's continued exercise of jurisdiction as it is to its dispositional holding that may terminate a parent's rights.

The supreme court in *B.G.* cited one appellate decision, *In re Francecisco*,[34] in direct support of its holding that section 729 permits continued jurisdiction on the basis of the best interests test. Like *B.G.*, however, *Francecisco* is one of the atypical cases that make bad law. The dispute in that case, though conducted in juvenile court, was a custody fight between two parents, each of whom had developed a prior relationship with the subject children. *Francecisco* is thus closer to the fact situation in *B.G.* than to the more usual juvenile court dependency conflict where the alternative to parental custody is unknown. Both *B.G.* and *Francecisco*, for reasons that will be explored in this Note,[35] should have been handled in more appropriate forums.

III. THE CONSTITUTIONAL ISSUES

The court's interpretation of section 729 not only contravenes the established juvenile court jurisdictional principle forbidding interference in parent-child relationships on a best interests standard; it also totally fails to deal with the constitutional question of whether a parent's interest in raising and caring for his or her child without interference by the state may be infringed absent certain unacceptable defects in the parent-child relationship. In *Stanley v. Illinois*,[36] the United States Supreme Court held that Illinois could not declare children dependents of the state and deprive their unwed father of their custody by utilizing a presumption that single fathers are unfit parents, without a hearing on the question of his fitness. While the holding, based on the due process clause, does not directly address the constitutional standards required for a court's continuing jurisdiction, *Stanley* asserts the constitutional principle that the right of a parent to raise his or her own child is fundamental.[37] Given the importance of this right, the

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33. *In re* Raya, 255 Cal. App. 2d 260, 265, 63 Cal. Rptr. 252, 255-56 (3d Dist. 1967) (footnotes and citations omitted).

34. 16 Cal. App. 3d 310, 94 Cal. Rptr. 186 (2d Dist. 1971).

35. See text accompanying notes 57-59 *infra*.

36. 405 U.S. 645 (1972).

37. *Id.* at 651, *citing* Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (right to direct the education of one's children deemed "essential"); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (right to conceive children held to be among the "basic civil rights of

Court makes clear that it must be protected "absent a powerful countervailing interest."[38]

The United States Supreme Court has impliedly recognized that state intervention may be justified where the child has a fit parent but has formed a parent-like relationship with another set of adults from whom separation would be traumatic.[39] In *B.G.*, there were factors which might make state intervention or at least arbitration desirable despite the presence of a fit natural parent. The children had become attached to their foster parents and hardly knew their mother, whom they had left as infants. Moreover, if the mother was given custody she planned to take them back to a country whose customs and language the children could not be expected to remember. It must be recognized, however, not only that juvenile court is not the only available forum for settling custody disputes, but that in cases where the parties each have pre-existing relationships with the children, it is perhaps the least appropriate one. The assumption of juvenile court jurisdiction in such cases, without special rules to govern the proceedings, distorts the safeguards designed to protect the rights of parents and, through them, the welfare of their children,[40] in the more usual state-parent conflicts with which juvenile court is concerned.

Neither use of the best interests test, nor the fact that a basis for original jurisdiction under section 600 at one time existed, provides an adequate safeguard against the dangers of state intervention in families on the basis of a court's subjective judgments about childraising. This is especially true in those cases where the original basis for jurisdiction was unrelated to parental unfitness. Fit parents who place their children with relatives or friends, in summer camp, or in boarding school because they are temporarily unable to care for them do not need to convince a court that the best interests of the children require their return to the parents. Yet in cases where parents are not so fortunate as to be able to place their children voluntarily, allowing juvenile court jurisdiction to be established originally because of the absence of sickness of a parent, the court may, after *B.G.*, continue jurisdiction if it disagrees with the way the child is being raised.

A possible argument favoring the standard for continuing juris-

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man"); May v. Anderson, 345 U.S. 528, 533 (1953) (right to child custody "far more precious . . . than property rights"); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder").

38. *Id.*

39. *E.g.*, Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972). *See also* Prince v. Massachusetts, 321 U.S. 158 (1944).

40. See text accompanying notes 31-33 *supra* and 46, 60-61 *infra*.

diction adopted by the court in *B.G.* is that the likelihood of detriment to the child, in those cases where grounds for jurisdiction once existed, is so great that it provides an independent ground for jurisdiction. If this additional basis had been intended by the legislature, it is certainly not clear from section 729. Moreover, assuming a higher likelihood of detriment to the child violates the constitutional principle of *Stanley* that a state may not use a conclusive presumption to justify taking jurisdiction in a child dependency case. Even a narrow reading of *Stanley*, limiting its application to cases where permanent deprivation of custody is involved, would not distinguish it from *B.G.* This is because, realistically, the "temporary" deprivation in *B.G.* will perpetuate the factors that led to placement with the foster parents and thus assure continuing renewal of the court's dispositional order.[41] Any rights the mother may retain in regard to her children thus have little, if any, practical significance.

IV. THE DISPOSITIONAL TESTS

Once the supreme court justified the continued jurisdiction of the juvenile court, it faced the problem of deciding which dispositional standard should have been applied. Both the mother[42] and the foster parents[43] cited section 726 of the Welfare and Institutions Code,[44] which governs most custody awards following juvenile court dispositional hearings. The foster parents interpreted section 726 as a best interests standard, drawing support from other statutes and custody decisions which stressed the importance of the welfare of the child.[45] The mother, on the other hand, read section 726 with the constitutional requirement in *Stanley v. Illinois*[46] and interpreted the statutory

41. See part IV *infra.*

42. Brief for Appellant at 26-27.

43. Brief for Roy and Madeline Smith as Amici Curiae at 12.

44. Section 726 states:

> [N]o ward or dependent child shall be taken from the physical custody of a parent or guardian unless upon the hearing the court finds one of the following facts:
>
> (a) That the parent or guardian is incapable of providing or has failed or neglected to provide proper maintenance, training, and education for the minor.
>
> . . . .
>
> (c) That the welfare of the minor requires that his custody be taken from his parent or guardian.

CAL. WELF. & INST'NS CODE § 726 (West 1972).

45. Smith brief, *supra* note 43, at 20-23, 25.

46. 405 U.S. 645 (1972). See text accompanying notes 36-38 *supra.* The language in *Stanley* does imply that the Constitution requires a finding of unfitness before a parent is deprived of custody. The Illinois statute at issue in *Stanley*, ILL. REV. STAT. ch. 37, §§ 701-02 (Smith-Hurd Supp. 1974), has purposes that are in all important respects similar to the express goals of the California Juvenile Court Act, CAL. WELF. & INST'NS CODE § 502 (West 1972), set out at note 56 *infra.* In light of these purposes,

language as a parental unfitness test.[47] Her interpretation reflected the long-standing state of the law in California,[48] which had not responded to a growing trend in other states toward the best interests test.[49]

Uncertainty as to the proper dispositional standard is partially explained by the 1969 passage of section 4600 of the Civil Code.[50] By its terms applicable to "all custody proceedings," section 4600 establishes a best interests standard qualified by a ranking of custody preferences and a requirement that, before custody is awarded to a nonparent, a finding be made that parental custody would be detrimental to the child. It was not clear, however, whether the legislature intended that section 4600 apply to juvenile court dependency hearings, which had for many years been governed by the separately codified and internally self-sufficient provisions of the Juvenile Court Law.[51]

Despite California's parental unfitness rule, the trial court applied a best interests test in awarding custody of the children to the foster parents. The court of appeal approved this test, stating it to be consistent both with section 4600, which it felt to be the applicable law, and with section 726.[52] The supreme court approved the use of section 4600, but held that the trial court's application of the section was improper because there was no finding that placement with the mother would be detrimental to the children.

For several reasons, section 4600 should not apply in juvenile court dependency proceedings. First, it was adopted as part of the Divorce Reform Act of 1969 in an attempt to narrow the scope of judicial discretion under the best interests test in divorce custody proceed-

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the Supreme Court in *Stanley* posed this question:

> What is the state interest in separating children from father without a hearing designed to determine whether the father is unfit in a particular disputed case? We observe that the State registers no gain toward its goals when it separates children from the custody of fit parents.

405 U.S. at 652. The Court also asserted that "[t]he State's interest in caring for Stanley's children is *de minimis* if Stanley is shown to be a fit father." *Id.* at 657-58. *But see* text accompanying notes 39 *supra* and 60 *infra*.

47. Brief for Appellant at 15-19, 26-27.

48. *See* Guardianship of Smith, 42 Cal. 2d 91, 265 P.2d 888 (1951); Roche v. Roche, 25 Cal. 2d 141, 152 P.2d 999 (1944); *In re* Campbell, 130 Cal. 380, 62 P. 613 (1900); Lois R. v. Superior Court, 19 Cal. App. 3d 895, 97 Cal. Rptr. 158 (2d Dist. 1971); *In re* A.J., 274 Cal. App. 3d 199, 78 Cal. Rptr. 880 (1st Dist. 1969); *In re* Raya, 255 Cal. App. 2d 260, 63 Cal. Rptr. 252 (3d Dist. 1967); Moffitt v. Moffitt, 242 Cal. App. 2d 580, 51 Cal. Rptr. 683 (3d Dist. 1966).

49. *See* Foster & Freed, *Child Custody Part I*, 39 N.Y.U.L. REV. 423 (1964); Comment, *The Custody Question and Child Neglect Rehearings*, 35 U. CHI. L. REV. 478 (1968); Comment, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151 (1963).

50. See note 15 *supra*.

51. CAL. WELF. & INST'NS CODE §§ 500-945 (West 1972 & West Supp. 1974).

52. *In re* B.G., 108 Cal. Rptr. 121 (4th Dist. 1973), *vacated*, 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974).

ings.[53] This reform was in part a response to the widely criticized case of *Painter v. Bannister*,[54] in which children were awarded to their grandparents under a best interests standard because the Iowa Supreme Court preferred their stable agrarian lifestyle to the "Bohemian" and "intellectual" existence of the children's father. There is no indication that the legislature intended that section 4600 be used in juvenile court proceedings, to which the stricter dispositional standard of section 726, permitting removal from a parent only when required for the welfare of the child,[55] already applied.

Second, an important policy reason for not applying section 4600 in juvenile court proceedings is that a principal purpose of that court is to preserve and improve the family unit.[56] Consistent with this purpose, the juvenile court does not have the authority to make the meaningful choices between long-range custody alternatives contemplated by section 4600, which lists priorities that presuppose conflicts between parties who are not unfit and who seek long-term custody of children in whom they already have interests. Because the juvenile court is concerned principally with regulating *state* intervention in difficult parent-child relationships, its rules are not designed to mediate conflicts between parents or de facto parents who are seeking long-term custody.

On the contrary, juvenile courts are authorized only to make short-range custody determinations which, under certain circumstances, may include removing children from the custody of their parents and placing them with foster parents. They may not appoint guardians or impose long-range parental responsibilities on those who accept chil-

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53. Law of March 21, 1872, as amended, ch. 49, § 1, [March 3, 1905] Cal. Stats. 43, as amended, ch. 930, § 1, [June 15, 1931] Cal. Stats. 1928, as amended, ch. 1700, § 6, [July 23, 1951] Cal. Stats. 3911 (repealed 1969).

54. 258 Iowa 1390, 140 N.W.2d 152, *cert. denied*, 385 U.S. 949 (1966). *See* Katz, *Foster Parents Versus Agencies: A Case Study in the Judicial Application of the "Best Interests of the Child" Doctrine*, 65 MICH. L. REV. 145 (1966); Note, *A Fit Parent May Be Deprived of Custody of His Child if the Best Interest and Welfare of the Child Would Be Served by Allowing Another Person to Raise Him*, 4 HOUSTON L. REV. 131 (1966).

55. See note 44 *supra* and text accompanying note 60 *infra*.

56. The Legislature expressly stated the goals of California's Juvenile Court Act:

> The purpose of this chapter is to secure for each minor under the jurisdiction of the juvenile court such care and guidance, preferably in his own home, as will serve the spiritual, emotional, mental, and physical welfare of the minor and the best interests of the State; to preserve and strengthen the minor's family ties whenever possible, removing him from the custody of his parents only when his welfare or safety and protection of the public cannot be adequately safeguarded without removal; and, when the minor is removed from his own family, to secure for him custody, care, and discipline as nearly as possible equivalent to that which should have been given by his parents. This chapter shall be liberally construed to carry out these purposes.

CAL. WELF. & INST'NS CODE § 502 (West 1972).

dren for placement. Foster parents lack the authority to make many decisions for a child, such as consenting to medical treatment, marriage, or even obtaining a driver's license.[57] Indeed, foster parents are often discouraged from developing any close parental ties, on the assumption that such ties will weaken the child's relationship with the natural parent and will eventually have to be broken.[58] As a result of these and other factors, foster care placements are notoriously unstable.[59] Under a set of juvenile court rules stressing family strength and unification, they are to be made sparingly. By making it easier to remove children from their parents, however, the decision in *B.G.* may make such placements more common.

In *B.G.*, the court was faced with two interested parties, each seeking long-range custody, and the priorities of section 4600 were therefore more relevant than in most juvenile court dependency proceedings. But while these factors help to explain why section 4600 was appropriate, they do not justify the use of the juvenile court forum. In *B.G.*, the custody battle could have been fought in the pending guardianship proceedings in probate court. Because the supreme court approved the application of section 4600 in a juvenile court without limiting its holding to cases where the parties have pre-existing relationships with the subject children, it will now be simpler for juvenile courts to remove children from parental custody even when the alternatives to parental custody are unknown. Use of the more relaxed standard of section 4600 removes one brake—the necessity under section 726 of the Welfare & Institutions Code of finding parental neglect or inability to provide proper care or of finding that the welfare of a child *requires* out-of-home placement[60]—from the temptation of individual judges to remove children from situations that they regard as "detrimental" to the child.[61] It is intellectually easier for a judge to find a particular setting detrimental, even absent subjective views about childrearing, than to acknowledge the risks inherent in out-of-home placements which are more likely to be considered under the test provided by section 726.

The court in *B.G.* attempted to downplay these dangers. It pointed out that the best interests test cannot be used to establish ju-

57. *See* Brief for Childhood and Government Project as Amicus Curiae at 16.

58. *See, e.g., In re* Jewish Child Care Ass'n, 5 N.Y.2d 222, 225, 156 N.E.2d 700, 702, 183 N.Y.S.2d 65, 67 (1959).

59. *See* California State Dep't of Social Welfare, Children Waiting 8 (Sept. 1972), reporting that 64 percent of California foster children had been placed in two or more homes.

60. CAL. WELF. & INST'NS CODE § 726 (West 1972). See note 44 *supra.*

61. For a discussion of these dangers from a psychological point of view, see Brief for Childhood and Government Project as Amicus Curiae at 20.

risdiction, and that a finding of detriment is still required before a parent can be denied custody.[62] The first observation ignores the contradiction of its contemporaneous holding that jurisdiction under section 729 can be *continued* by applying a best interests test even when the original grounds for jurisdiction no longer exist.[63] The second observation draws attention to the court's failure to pinpoint what is meant by "detriment" or to offer any analysis that would be helpful in distinguishing the detriment test from other possible dispositional standards.

The court in *B.G.* implied that there are three distinguishable dispositional tests—the fitness test, the detriment test, and the best interests test.[64] It clearly regarded the parental fitness test as quite distinct from either the best interests or the detriment test,[65] and its remand for a finding on the issue of detriment—when the lower court had already found that placement with the foster parents was in the children's best interests—illustrates the court's belief that these tests are distinctly different. What the differences are, however, is not clear.

In *Guardianship of Marino*,[66] a court of appeal eschewed the parental unfitness test in guardianship proceedings in favor of the detriment test of section 4600, but it also found that appellate courts may imply a finding of detriment from the trial court's decision on a child's best interests, thereby blurring any distinction between the two tests. The court in *B.G.* refused to imply a finding of detriment from the trial court's decision, but it cited without disapproval a portion of the trial court's opinion that included consideration of factors relevant only in the most conclusory way to the issue of the children's detriment.[67]

One case affected by *B.G.*, *In re Tammy F.*,[68] illustrates the continued confusion between the detriment and best interest tests. Four

62. 11 Cal. 3d at 698-99, 523 P.2d at 257-58, 114 Cal. Rptr. at 457-58.

63. See text accompanying notes 20-21 *supra*.

64. It should be noted that courts frequently have found ways to make custody decisions on the basis of their own subjective values, regardless of the test controlling their decisions. Several courts, for example, have included the adulterous acts of a mother within their definitions of conduct constituting neglect, without any meaningful attempt to connect this conduct to the child's welfare. *E.g.*, *In re* Booth, 253 Minn. 395, 91 N.W.2d 921 (1958); *In re* Anonymous, 37 Misc. 2d 411, 238 N.Y.S.2d 422 (Renneselaer County Family Ct. 1962); *In re* Three Minors, 50 Wash. 2d 653, 314 P.2d 423 (1957). *But see In re* Raya, 255 Cal. App. 2d 260, 63 Cal. Rptr. 252 (3d Dist. 1967).

65. 11 Cal. 3d at 686-87, 695, 523 P.2d at 248-49, 257, 114 Cal. Rptr. at 448-49, 457.

66. 30 Cal. App. 3d 952, 106 Cal. Rptr. 655 (2d Dist. 1973).

67. See text accompanying note 29.

68. No. 10747-J (Sonoma County Super. Ct., July 9, 1974).

children were declared dependents of the juvenile court when their mother was incarcerated on a minor drug offense. Upon her release, the mother sought return of her children. Although the original grounds for jurisdiction disappeared when she was released from prison, shortly thereafter the children's social worker discovered that the mother was involved in a lesbian relationship. Jurisdiction was continued in this case under section 729, despite the holding by another court of appeal that lesbianism alone is not enough to warrant depriving a mother of custody,[69] because the trial court felt that maintaining jurisdiction would advance the best interests of the children.[70] As a result, the children were kept in foster care placements.[71] After the decision in *B.G.*, the court of appeal remanded *Tammy F.* for a finding of detriment.[72] At the next review hearing, lengthy testimony by psychiatrists and social workers indicated that no detriment to the children would result from the mother's lesbian relationship, but the juvenile court referee nevertheless made a finding of detriment.[73]

V. UNIFORMITY AMIDST DIVERSITY

The confusion of standards in child custody proceedings—both jurisdictional and dispositional—fosters the injection of subjective values into custody decisions, encourages state intervention in family relationships, and permits inconsistent results. A uniform standard such as that of section 4600 may help resolve the confusion on the dispositional level, but it fails to prevent state intervention in families where

69. Nadler v. Superior Court, 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (3rd Dist. 1967).

70. *In re* Tammy F., No. 10747-J (Sonoma County Super. Ct., Aug. 31, 1972).

71. *In re* Tammy F., No. 10747-J (Sonoma County Super. Ct., Sept. 7, 1972).

72. *In re* Deanna P., No. 1 Civ. 3400 (1st Dist., July 2, 1974).

73. *In re* Tammy F., No. 10747- J(Sonoma County Super. Ct., July 9, 1974). The mother appealed and filed a petition for rehearing before the juvenile court judge; a rehearing was granted, but she decided to dismiss the action rather than undergo another trial.

The State of California's position in another recent case, *In re T.M.R.*, 41 Cal. App. 3d 694, 116 Cal. Rptr. 292 (1st Dist. 1974), illustrates still further the confusion that exists between the various dispositional tests. *T.M.R.* was an action to terminate parental rights to which section 232 of the Civil Code expressly applies. After holding that grounds for termination under section 232 did not exist, the court of appeal gratuitously found that section 4600 applied in termination actions and that it would not be detrimental to the children to be returned to their mother. In its petition for hearing before the California Supreme Court, the state argued that section 4600 should not apply in termination actions and that, because the grounds under section 232 were found to exist by the trial court, parental rights should be terminated. Brief for Petitioner at 4-8. This position presupposes that the detriment requirement of section 4600 may be, at least in certain circumstances, a more rigorous test for the state to meet than the test traditionally required for the termination of parental rights, because it necessitates finding a causal link between parental behavior and the welfare of the child.

unusual circumstances do not exist, a possibility not dispelled by the *B.G.* decision.

Beyond a common dispositional standard, what is needed is the introduction, throughout the child custody legal framework, of consistent principles that reflect society's values and present knowledge about children. This would not require uniform rules in each forum, nor the consolidation of all custody proceedings in one form;[74] the different situations in which custody proceedings develop create different dangers, against which different procedural safeguards may provide the best protection. The proposed integration does require that the significant factors in all child custody disputes are identified and their implications in different contexts examined.

Our society does not have a working set of principles about child-raising. Attitudes about what is good for children and what children should be like are diverse and changing. An important recent work, *Beyond the Best Interests of the Child*, offers one set of guidelines attempting to take account of this diversity while integrating some of the predominant values and present knowledge about what is "good" for children. The authors, admitting the limitation of psychoanalytical theory in predicting how individual children will thrive in different situations, rely on the proposition that a child has a critically important need for an "unbroken continuity of affectionate and stimulating relationship with an adult."[75] They attempt to balance two primary but potentially conflicting assumptions—that parents have a right to raise their children without state interference, and that society's best interests are served when the child's best interests, undiluted by the parents' interests, are served.[76] The guidelines they propose are as follows: that placement decisions should safeguard the child's need for continuity in relationships; that the decisionmaking process in child placement decisions should reflect the child's abbreviated sense of time; and that placement decisions should take into account the law's incapacity to supervise interpersonal relations and its limitations in making long-range predictions.[77]

Two principal legal reforms to implement these guidelines are outlined in a Model Placement Statute: first, the burden of showing that a child's current placement is not the least detrimental placement alternative[78] is placed on the party seeking to disrupt this relationship;

74. Bodenheimer, *The Multiplicity of Child Custody Proceedings—Problems of California Law*, 23 STAN. L. REV. 703, 731-32 (1971).

75. J. GOLDSTEIN, A. FREUD, & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 6 (1973).

76. *Id.* at 7, 109-110.

77. *Id.* at 31, 40, 49.

78. The authors prefer the least detrimental alternative standard to the best inter-

second, the entire decisionmaking procedure is accelerated to force permanent placement decisions that recognize the child's shortened sense of time.[79]

Goals like these were the basis of last session's Senate Bill 1485, passed by both houses of the California legislature but vetoed by Governor Reagan.[80] The bill would have significantly changed the operation of out-of-home placement in California by maintaining families for as long as possible but facilitating the termination of parental rights once it became necessary to remove children from their parents' custody. In order to take child from his or her parental home, the state would have had to show that this removal was a necessary last resort—that the child was in substantial physical danger or suffering from severe emotional stress, and that protective services were offered to the family but had either failed or been rejected.[81] Where a child was separated from his or her parents, a six-month review[82] would have been required. After 18 months, another required study would have brought development of a long-term plan for the child.

This bill, as law, might have prevented a case like *B.G.* from reaching the supreme court. Additional notice safeguards[83] would have lessened the possibility that a mother would be unaware her children were to be placed with foster parents. The shortened review procedure, and the requirement that either permanent placement or immediate return to the parent be considered within six months or at the very most 18 months, would have stimulated an early return of the children to the mother. Alternatively, if the same notice errors had again occurred, the proposed law would have forced an earlier and permanent custody award to the foster parents, resolving the prolonged uncertainty that is clearly detrimental to children.

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ests standard, principally because it tends to remind decisionmakers that the child is always a victim and that "their task is to salvage as much as possible out of an unsatisfactory situation," and also because a new standard will encourage a shift away from balancing competing adult interests with the child's interests. *Id.* at 53-64.

79. *Id.* at 100.

80. The bill was vetoed on September 27, 1974. SENATE WEEKLY HISTORY, Part 2, Oct. 4, 1974, at 253.

81. This requirement has been explicitly rejected by California courts despite statutory language suggesting a contrary result. See text accompanying note 61 *supra*. *In re* Jeannie Q., 31 Cal. App. 3d 709, (2d Dist. 1973), *modified*, 32 Cal. App. 3d 288, 107 Cal. Rptr. 646 (2d Dist. 1973); *In re* Deborah G., No. 2 Civ. 40391 (2d Dist. 1973).

82. The current law requires only a yearly review. CAL. WELF. & INST'NS CODE § 729 (West 1972).

83. These safeguards include: requiring notice to parents of the risk of termination of their parental rights; requiring a showing that attempts were made to provide services which were not accepted or which proved ineffectual before a child is removed from his or her home; and requiring special notice when a child is to be placed in a county different from the one in which the parent lives. Cal. Senate Bill 1485 (1974).

The possibility of the state itself taking custody from a natural parent raises constitutional questions discussed earlier in this Note.[84] Cases such as *B.G.*, involving not state custody but the sharp conflict between the constitutional rights of a fit parent and the welfare of children who have formed a parent-child relationship with de facto parents, illustrate the tension between the constitutional interest of parents in children and the child-oriented basis of child custody laws. The resolution of this tension required making a judgment about whose rights are primary, those of the parent or those of the child. Where a parent is "guilty" of neglect, there is little difficulty in resolving the question in favor of the child's welfare. Where a parent is fit and non-negligent, but has lost custody of a child for some reason unrelated to parental fitness—sickness, a prison sentence,[85] the wrongful holding of the child by another,[86] or negligence on the part of third parties[87]—and in the meantime a parent-child relationship has developed between the child and de facto parents, the answer, though probably the same, is far more difficult.

CONCLUSION

The court in *B.G.* recognized that this tension should be resolved in favor of the interests of the child. In so doing, however, it ignored the potential impact of the decision on juvenile court law, which was intended to permit unsolicited state intervention in the parent-child relationship only in the most unusual circumstances.[88]

A number of commentators have suggested altering existing juvenile court law to deal with the the atypical cases in which a child has developed a parent-child relationship with non-parents, in order to facilitate results like the one ultimately permitted in *B.G.*[89] Until the legislature acts to achieve this purpose, however, courts should proceed only with the utmost care, lest safeguards meant to protect the important rights and interests involved in the typical state-parent controver-

84. See text accompanying notes 36-38, 46 *supra.*

85. *In re* Deanna P., No. 1 Civ. 3400 (1st Dist., July 2, 1974); *In re* T.M.R., 41 Cal. App. 3d 694, 116 Cal. Rptr. 292 (1st Dist. 1974).

86. Scarpetta v. DeMartino, 254 So. 2d 813 (D.C.A. Fla. 1971), *reh. denied*, 262 So. 2d 442 (Fla.), *cert. denied*, 409 U.S. 1011 (1972).

87. *In re* B.G., 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974).

88. *See* cases cited note 24 *supra.*

89. *See, e.g.*, Hunter, *Child Custody—Rebutting the Presumption of Parental Preference*, 43 MISS. L.J. 247 (1972); Levine, *Child Custody: Iowa Corn and the Avant Garde*, 1 FAM. L.Q. 3 (1967); Comment, *Custody of Children: Best Interests of Child vs. Rights of Parents*, 33 CALIF. L. REV. 306 (1945); Comment, *The Custody Question and Child Neglect Rehearings*, 35 U. CHI. L. REV. 478 (1968); Comment, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 YALE L.J. 151 (1963).

sies that are the main business of juvenile courts be diluted in the effort to resolve a peculiar case. The court in *B.G.* failed to exercise caution; instead, it tampered with juvenile court law to accomplish results which could have been reached through other means. This mistake, if not rectified through legislation or clarification by the supreme court itself in a later case, could lead to unjust and perhaps even unconstitutional results in subsequent juvenile court dependency cases.

Katharine T. Bartlett

IX

LABOR LAW

Construing City Charter Provisions Designed to Resolve Public Employee Labor Disputes

Fire Fighters Union v. City of Vallejo.[1] In this case of first impression, the California Supreme Court construed a public employee law recently enacted by the voters of the city of Vallejo as an amendment to the city charter. The law provides for a "system of collective negotiating" to be supplemented by mediation, fact finding, and binding arbitration. However, the law allows these bargaining procedures only "on matters of wages, hours, and working conditions, but not on matters involving the merits, necessity, or organization of any service or activity . . . ."[2]

1. 12 Cal. 3d 608, 526 P.2d 971, 116 Cal. Rptr. 507 (1974) (Tobriner, J.) (unanimous decision).

2. Vallejo City Charter section 809 provides:

> Consistent with applicable law, the City Council shall by ordinance provide a system of collective negotiating to include:
>
> a. It shall be the right to City employees individually or collectively to negotiate on matters of wages, hours, and working conditions, but not on matters involving the merits, necessity, or organization of any service or activity provided by law, or on any matter arising out of Sections 803(n) or 803(o) of this Charter.
>
> b. The City Council shall direct the City Manager and/or his designated representative(s) to negotiate in good faith with recognized employee organizations.
>
> c. Agreements reached between City representatives authorized in (b) above and the representatives of recognized employee organizations shall be submitted in writing to the City Council for its approval, modification, or rejection.
>
> d. There shall be established a timetable for the total process of collective negotiations, including mediation and fact finding, as herein provided, which will, if successful, assure a final agreement between the parties no less than 45 days before the end of the current fiscal year.
>
> e. If, after a period of time to be set forth in the ordinance, no agreement can be reached between City representatives authorized in (b) above and the representatives of recognized employee organizations, or if the City Council refuses to ratify the agreement arrived at or modifies such agreement in any manner unacceptable to said employee organizations, the parties shall request